MARKET DEVELOPMENT ADVISORY GROUP

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Copies to:
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Dear Johnathan

Saves and Win-Backs Problem Definition Proposed Revision

Thank you for your email on behalf of Ecotricity, Electric Kiwi, Pulse Energy and Vocus to the MDAG secretariat dated 29 March 2018, outlining your proposed revisions to the MDAG's problem definition for the *Saves and win-backs* project set out in the project plan.

The MDAG discussed your proposed revisions at its most recent meeting on 10 April and has decided at this time to retain the problem definition in the project plan.

Nevertheless, as you are aware, the MDAG is in the process of preparing an issues paper, and strongly encourages you to make a submission when the issues paper is released for consultation.

In particular, while the MDAG appreciates the concerns you have raised around fairness, the group advises all submitters to show, in economic terms, how any proposal is consistent with the Authority's Code amendment principles and the Authority's statutory objective.

This is because the Authority Board has asked the MDAG to provide its advice on that basis. I have attached a copy of the Authority's Consultation Charter, which includes the Code amendment principles, for your reference.

Thank you again for your email and for meeting with the MDAG on 15 March – I know the members greatly appreciated the opportunity to hear from all of you in person.

Yours sincerely

James Moulder
Chairperson

Appendix A The Electricity Authority's Consultation Charter

Consultation Charter

19 December 2012

Part 1 – Processes for amending the Code

1. Purpose of Part 1 of this Charter

1.1. In accordance with section 41 of the Electricity Industry Act 2010 (Act), Part 1 of this consultation charter (Charter) sets out guidelines relating to the processes for amending the Electricity Industry Participation Code (Code).

1.2. Part 1 also provides guidance on preparing and submitting Code amendment proposals to the Electricity Authority (Authority).

1.3. Part 1 is structured as follows:

- the principles that the Authority and its advisory groups will adhere to when considering Code amendment matters;
- the role of advisory groups with regard to Code amendment matters;
- who can propose an amendment to the Code;
- how to submit a Code amendment proposal;
- the information that should be included in a Code amendment proposal;
- the Authority's criteria for prioritising Code amendment proposals;
- information about the register of Code amendment proposals;
- the Authority's role in the Code amendment process; and
- the process for notifying interested parties of an amendment.

2. Code amendment principles

2.1. Section 32(1) of the Act requires that any amendments to the Code must be consistent with the Authority's statutory objective, which is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers. In addition, any amendments to the Code must be necessary or desirable to promote any or all of the following:

(a) competition in the electricity industry;

(b) the reliable supply of electricity to consumers;

(c) the efficient operation of the electricity industry;

(d) the performance by the Authority of its functions under section 16 of the Act; and

(e) any other matter specifically referred to in the Act as a matter for inclusion in the Code.

2.2. As amendments to the Code can substantially affect industry participants, and unpredictable and ill-founded amendments can undermine investor confidence, the Authority considers there is value in stating principles that the Authority and its advisory groups must adhere to when considering Code amendment matters. The primary purpose of the principles is to provide industry participants with greater predictability about decision-making on likely amendments to the Code, to maximise investor certainty.

2.3. The Code amendment principles are intended to provide guidance to interested parties, and industry participants in particular, about:

- the potential scope of the Code with regard to achieving the Authority's statutory objective; and
- how the Authority and its advisory groups will consider Code amendment matters, particularly in cases where cost-benefit analysis yields inconclusive results.

2.4. In general it may not be practicable to apply the Code amendment principles to minor or urgent Code amendment proposals. In both cases the Authority will notify industry participants the proposal is classified as minor or urgent and that the Code amendment principles may not be rigorously applied.

2.5. When considering amendments to the Code, the Authority and its advisory groups will have regard to the following Code amendment principles to the extent that the Authority and its advisory groups consider that they are applicable in each case:

Principle 1 – Lawful: The Authority and its advisory groups will only consider amendments to the Code that are lawful and that are consistent with the Act (and therefore consistent with the Authority's statutory objective and its obligations under the Act).

Principle 2 – Provides Clearly Identified Efficiency Gain or Market or Regulatory Failure: Within the legal framework specified in Principle 1, the Authority and its advisory groups will only consider using the Code to regulate market activity when:

- it can be demonstrated that amendments to the Code will improve the efficiency[1] of the electricity industry for the long-term benefit of consumers;
- market failure is clearly identified, such as may arise from market power, externalities, asymmetric information and prohibitive transaction costs; or
- a problem is created by the existing Code, which either requires an amendment to the Code, or an amendment to the way in which the Code is applied.

Principle 3 – Net Benefits are Quantified: When considering possible amendments to the Code, the Authority and its advisory groups will ensure

[1] Where efficiency refers to allocative, productive and dynamic efficiency, and improvements to efficiency include, for example, a reduction in transaction costs or a reduction in the scope for disputes between industry participants.

disclosure of key assumptions and sensitivities, and use quantitative cost-benefit analysis to assess long-term net benefits for consumers, although the Authority recognises that quantitative analysis will not always be possible. This approach means that competition and reliability are assessed solely in regard to their economic efficiency effects. Particular care will be taken to include dynamic efficiency effects in the assessment, and the assessment will include sensitivity analysis when there is uncertainty about key parameters.

Tie-breaker 1: Principles 4 – 8 apply when the cost-benefit analysis of Code amendment options demonstrates a positive net benefit relative to the counterfactual, but is inconclusive about which is the best option. The Authority will weight these principles in accordance with their relevance and significance for each proposal.

Principle 4 – Preference for Small-Scale 'Trial and Error' Options: When considering possible amendments to the Code, the Authority and its advisory groups will give preference to options that are initially small-scale, and flexible, scalable and relatively easily reversible with relatively low value transfers associated with doing so. In these circumstances the Authority will monitor the effects of the implemented option and reject, refine or expand that solution in accordance with the results from the monitoring.

Principle 5 – Preference for Greater Competition: The Authority and its advisory groups will give preference to Code amendment options that have larger pro-competition effects, because greater competition is *likely* to be positive for economic efficiency and reliability of supply.

Principle 6 – Preference for Market Solutions: The Authority and its advisory groups will give preference to Code amendment options that directly address the source of the market failure identified under Principle 2, so as to facilitate efficient market arrangements. The Authority and its advisory groups will discount options that subdue or displace efficient market structures.

Principle 7 – Preference for flexibility to allow innovation: The Authority and its advisory groups will give preference to Code amendment options that provide industry participants with greater freedom and lower costs to adapt to the Code amendment as they see fit, unless more restrictive options are justified on the grounds of non-rivalry and/or non-excludability conditions.[2] In the case where both conditions hold perfectly it is generally efficient to adopt a 'one size fits all' approach, such as uniform standards. Where these conditions do not hold it may be more efficient to utilise flexible mechanisms, such as incentives.

Principle 8 – Preference for Non-Prescriptive Options: Wherever practicable, when the Authority and its advisory groups are considering standards, they will give preference to Code amendment options that specify the outcomes required

[2] A good or service is *non-rival* when additional consumption by one party does not reduce the amount available for any other party to consume. For example, electricity consumption is rival but security of supply is non-rival. A good or service is *non-excludable* when it is not economically viable to exclude parties from consuming the good or service. For example, electricity consumption is excludable because retailers generally incur a relatively low economic cost to cut power supply to consumers that do not pay their electricity bills. On the other hand, market prices are non-excludable because it is too costly to prevent disclosure of prices to parties that do not contribute to the costs of operating the market.

of industry participants rather than prescribe what they must do and how they must do it. That is, outcome standards are preferred to input standards, wherever possible.

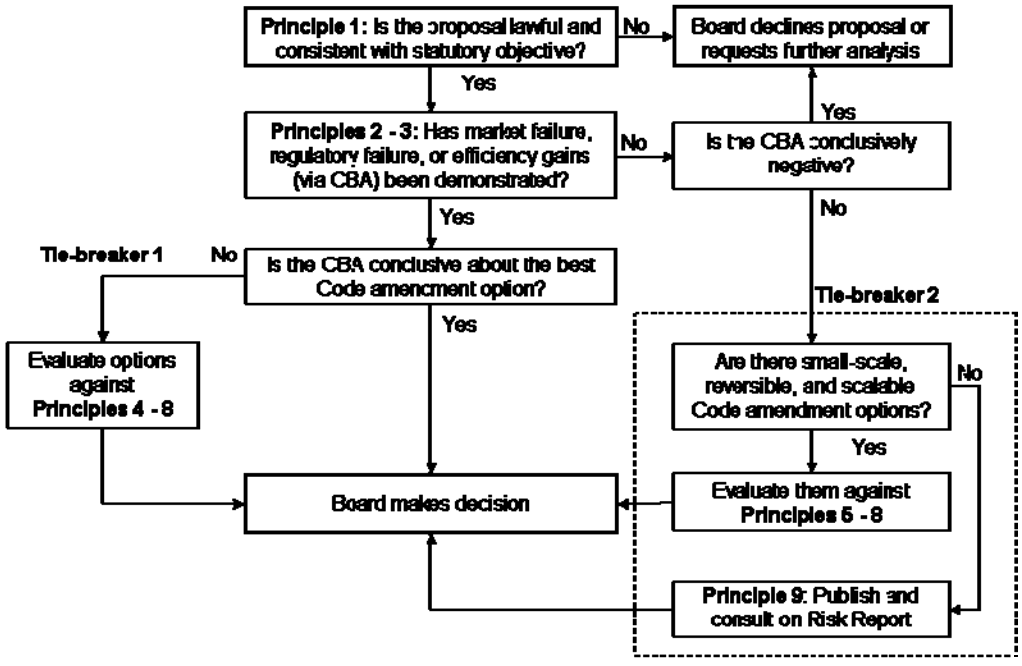
Tie-breaker 2: Principle 9 applies when the cost-benefit analysis of Code amendment options is inconclusive that a Code amendment would yield net benefits and there are no options that are small-scale, flexible, scalable and relatively easily reversible.

Principle 9 – Risk Reporting: The Authority will publish a report:

- that assesses the risks of making and not making the Code amendment, taking into account Principles 5 – 8, and factoring in the option value associated with waiting longer before intervening; and
- that identifies and assesses non-Code methods for mitigating or addressing the problem.

The Authority will consult interested parties on the risk report before making a final decision on whether or how to amend the Code.

Figure 1: Application of the Code amendment principles



3. Role of advisory groups

3.1. The Act requires the Authority to establish one or more advisory groups (in addition to the Security and Reliability Council) to provide independent advice to the Authority on the development of the Code and on market facilitation. Every advisory group must include people who the Authority considers have appropriate knowledge of, and experience in, the electricity industry and consumer issues, but members need not be independent persons.

3.2. The Authority intends advisory groups to be a primary means for developing Code amendment options for significant and non-urgent matters. The Authority has given advisory groups responsibility for (among other things):

- making recommendations to the Board in regard to aspects of the Code and market-facilitation measures identified in their terms of reference and workplan;
- deciding the extent and type of analysis and feedback they undertake to make recommendations to the Board; and
- deciding the content of discussion papers on matters identified in their terms of reference and workplan (noting that the Authority is responsible under the Act for consulting with interested parties on Code amendment proposals in accordance with the consultation requirements of section 39 of the Act, and that any stakeholder feedback sought by advisory groups on discussion papers canvassing issues and options for developing the Code and/or market-facilitation measures is not consultation required under the Act (hence the deliberate use of 'discussion papers' as opposed to 'consultation papers')).

The Authority will require its advisory groups to adopt the general principles and processes described within this Charter having regard to the particular feedback sought and related factors.

3.3. The Authority has prepared a separate charter about the Security and Reliability Council and other advisory groups.

4. Preparing and submitting Code amendment proposals

Persons that can propose an amendment to the Code

4.1. Code amendment proposals may be submitted to the Authority by any person, regardless of whether they are an industry participant or not. The person can be an individual, a company, or any other type of legal entity.

Submission of a Code amendment proposal

4.2. The Authority prefers that Code amendment proposals are submitted using the electronic form available on the Authority's website. The advantage of using this form is that it reduces the time taken to assess proposals because it clearly identifies proposals as Code amendment proposals requiring assessment, and prompts proposers to provide information that is required for assessment.

4.3. Proposers who want to submit a Code amendment proposal but do not wish to use the electronic form on the Authority's website should provide written proposals and should clearly identify the proposal as a Code amendment proposal to ensure it is treated as such.

4.4. The Authority's policy is to acknowledge receipt by writing to the proposer, within one week of receiving a Code amendment proposal.

Information to include in a Code amendment proposal

4.5. The Act sets out what may and may not be included in the Code (section 32). A Code amendment proposal must therefore relate to one of the matters that may be included in the Code.

4.6. If a Code amendment proposal relates to an existing provision of the Code, a reference to the existing clause should be included in the proposal.

4.7. If a Code amendment proposal relates to a new provision, the subject matter of the new provision should be stated in the proposal.

4.8. The Authority recommends that proposals include the following information to assist the Authority's consideration of the proposal:

- a description of the amendments that are proposed to be made to the Code;
- identification of whether and why the proposed Code amendment is:
  - urgent or non-urgent;
  - technical and non-controversial; or
  - has widespread support among the people likely to be affected by the amendment;
- identification of whether there has been prior consultation on the proposed Code amendment;
- a statement of the objectives of the proposed Code amendment;
- an evaluation of the costs and benefits of the proposed Code amendment, which is commensurate with the proposal, and which takes into account the ability of the proposer to resource the evaluation;
- an evaluation of alternative means for achieving the objectives of the proposed Code amendment;
- identification of anyone who is likely to be affected by the proposed Code amendment; and
- any other relevant information.

4.9. A Code amendment proposal may also include a draft of the proposed Code amendment to the Code. Drafts may help the Authority to understand the problem that a proposer seeks to address, or the extent to which the proposer considers the Code needs to be amended. Any drafts provided will be considered by the Authority but may not necessarily be reflected in the Authority's decisions. Proposers should refer to the Authority's Drafting Manual if submitting proposed drafting amendments.[3]

[3] www.ea.govt.nz/act-code-regs/code-regs/

Prioritisation and categorisation of Code amendment proposal

4.10. The initial prioritisation and categorisation of each proposal will be based on the proposal's merits, as assessed against the Authority's statutory objective and functions, as well as the following non-exhaustive criteria:

- importance for consumers and the electricity industry;
- market impact;
- size of the analysis required;
- interrelation with other proposals and projects; and
- resources.

4.11. The Authority will process all Code amendment proposals in accordance with the provisions of the Act, and the Authority's policies. Not all proposals will proceed to consultation or be the subject of an amendment to the Code. The Authority exercises its discretion, within legal and regulatory requirements, to decide which Code amendment proposals will be the subject of a proposed amendment to the Code and which proposals will not.

Code Amendment Proposal Register

4.12. The Authority maintains a register of Code amendment proposals, which includes proposals made by participants. The Code Amendment Proposal Register is updated and published at regular intervals.

4.13. The main purposes of the Code Amendment Proposal Register are to:

- provide a mechanism for the Authority to centrally record and monitor proposals for amendments to the Code; and
- provide transparency to proposers of Code amendment proposals as to the status of their proposals.

4.14. The Code Amendment Proposal Register does not record all work being undertaken on the development of the Code by the Authority. The Authority's Workplan Register records this wider Code development work.

Code amendment proposal process

4.15. The Authority's role in the Code amendment process where a Code amendment proposal is received involves the following steps:

(a) initial assessment of the proposal:

- the Authority receives and acknowledges proposals then completes a two part assessment:
  - part 1: the proposal is assessed to determine whether it relates to a matter that may be included in the Code; and

- part 2: the proposal is categorised to identify when the Authority will progress the proposal.

- if the proposal does not relate to a matter that may be included in the Code under section 32 of the Act, the Authority will advise the proposer that the proposal will not proceed and give reasons for that decision.

- if the proposal relates to a matter that may be included in the Code under section 32 of the Act, the Authority will advise the proposer that the proposal has been categorised as:

  - *Current*: it has been included in the Authority's current financial year workplan; or

  - *Future*: it is under consideration for the Authority's workplan for the next financial year, or for the subsequent financial year if the workplan for the next financial year is already set; or

  - *Pending*: it is added to a list that will be reviewed annually for inclusion in the Current or Future categories; or

  - *Declined*: the Authority has decided that the proposal will not proceed.

- a decision by the Authority on the categorisation of a proposal will take into account the priority of the proposal with reference to the Authority's objective and functions under the Act, as weighed against the Authority's resources and workload.

- the Authority will take a maximum of 3 months to complete this categorisation. The Authority will promptly advise proposers of the outcome of the categorisation.

(b) substantive analysis of the proposal and preparation of regulatory statement:

- if the proposal relates to a matter that may be included in the Code under section 32 of the Act, and fits within the Authority's current financial year workplan, the Authority must prepare a regulatory statement in accordance with section 39 of the Act.

- the length of time that will be required to prepare the regulatory statement will depend on the complexity and impact of the Code amendment proposal and on how the proposal has been prioritised within the Authority's workplan.

- the Authority will keep proposers informed of progress via its Workplan Updates.

(c) pre-consultation on the proposal:

- the Authority may refer the proposal to one or more advisory groups for advice prior to the Authority publicising the draft of the proposed Code amendment, the regulatory statement and the consultation paper.

(d) publication of a draft of the proposed Code amendment, the regulatory statement and a consultation paper (if required under the Act).

(e) consultation on the proposal: The Authority will consult on the proposal in accordance with the consultation standards and processes set out in Part 2 of this Charter.

(f) consideration of submissions received on the proposal.

(g) decision regarding whether it is appropriate to amend the Code.

(h) if appropriate, amending the Code.

Publication and notice of amendment

4.16. Under section 38(3) of the Act, an amendment to the Code is made by:

- publicising[4] the amendment; and
- giving notice in the Gazette of:
  - the date on which the amendment comes into force; and
  - a short summary of what the amendment contains or relates to.

[4] Defined under the Act as requiring the Authority to make a document or information available free of charge:
(a) on its website at all reasonable times (except to the extent that doing so would infringe copyright in the material or be inconsistent with any enactment or rule of law); and
(b) in any other manner that the Authority may decide.

Part 2 – Processes for consulting on proposed amendments to the Code

1. Introduction

1.1. In accordance with section 41 of the Act, Part 2 of this Charter sets out guidelines relating to processes for consulting on proposed amendments to the Code.

1.2. Part 2 is structured as follows:

- **Section 2** sets out guidelines on the process for consulting on Code amendment proposals, including:
  - general consultation principles that the Authority will follow;
  - the statutory requirements with regard to amending the Code;
  - the Authority's process for consulting on Code amendment proposals, including when the Authority may vary from this process; and
  - guidance with regard to confidential information provided during consultation.
- **Section 3** provides guidance in regard to the approach that the Authority will adopt for other consultation.
- **Section 4** provides guidance with regard to the approach that the Authority will adopt for other matters on which the Authority will seek feedback from interested parties, but for which the Authority is not required to consult.

2. Process for consulting on Code amendment proposals

General consultation principles

2.1. When the Authority undertakes consultation on Code amendment proposals, it will design its process to comply with the basic standards for consultation established by case law – specifically the principles of consultation specified by the Court of Appeal in 1993.[5] The Authority interprets those principles as being as follows:

(a) there are no universal requirements as to the form of consultation, and any type of interaction (whether oral or written) that allows adequate expression and consideration of views will be sufficient.

(b) consultation must be allowed sufficient time, and genuine effort must be made.

[5] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671.

(c) consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what to do.

(d) for consultation to be meaningful, the Authority must make available sufficient information to enable parties who are consulted to be adequately informed to make "intelligent and useful" responses.

(e) interested parties can not complain if they do not avail themselves of the opportunity to provide feedback.

(f) the word "consultation" does not require agreement (although it does require more than mere telling, or presenting). The Authority recognises that this principle is particularly relevant in relation to its objective and functions. With regard to many of the issues that the Authority is required to deal with, industry stakeholders have widely divergent views and the issues may have been unresolved for many years. The Authority recognises that it is charged with breaking such deadlocks by making decisions in relation to those matters.

(g) "consultation" cannot be equated with "negotiation". Negotiation implies a process that has as its objective arriving at agreement (although in consultation the tendency is, at least, to seek consensus).

(h) the Authority must approach the matter with an open mind, and must be prepared to change or even start a process afresh.

Consulting on Code amendment proposals

2.2. The Act provides that the Authority may amend the Code at any time, subject to the requirements in section 39 of the Act. Section 39 provides that, before amending the Code, the Authority must:

- publicise a draft of the proposed amendment; and
- prepare and publicise a regulatory statement; and
- consult on the proposed amendment and the regulatory statement.

Preparation and publication of regulatory statement

2.3. Under section 39(2) of the Act, the regulatory statement prepared and publicised by the Authority before amending the Code must include:

- a statement of the objectives of the proposed amendment;
- an evaluation of the costs and benefits of the proposed amendment; and
- an evaluation of alternative means of achieving the objectives of the proposed amendment.

2.4. After the Authority has publicised a draft of the proposed Code amendment and the regulatory statement, the Authority will:

- provide an opportunity for persons that the Authority thinks are representative of the interests of persons likely to be affected by the proposed Code amendment to make submissions; and

- consider those submissions.

2.5. To undertake this consultation, the Authority will prepare a consultation document and publicise it on the Authority's website with the draft of the proposed Code amendment and the regulatory statement. The Authority will publish forecast dates at which future consultation and discussion papers are anticipated to be released.

2.6. The Authority will usually allocate six weeks for consultation. However, this may vary, depending on, for instance, the complexity of the issues being consulted on or the number of concurrent consultations with interested parties.

2.7. If an amendment to the Code will, or is likely to, affect the Commerce Commission in the performance of its functions or exercise of its powers under Part 4 of the Commerce Act 1986, the Authority must consult with the Commerce Commission before amending the Code (under section 54V of the Commerce Act).

2.8. Once submissions have been received and analysed, the submissions and a summary of the submissions will be published on the Authority's website. Submitters must clearly explain all aspects of their submission.

2.9. A second consultation round may occur if the issues identified during or before consultation mean that additional consultation is desirable.

2.10. Under section 39(3) of the Act, the Authority is not required to prepare and publicise a regulatory statement or consult on the proposed Code amendment and regulatory statement in certain circumstances. The consultation process outlined above may not apply where those circumstances apply. In particular, the consultation process may not apply if:

- the nature of the amendment is technical and non-controversial (for example, editorial and minor amendments to the Code that have no substantial effect on industry participants); or

- there is widespread support for the amendment among the people likely to be affected by it; or

- there has been adequate prior consultation (for instance, by or through an advisory group) so that all relevant views have been considered.

Urgent amendments to the Code

2.11. Section 40 of the Act states that the Authority is also not required to comply with the requirement to publicise a draft of the proposed Code amendment, or to prepare and publicise a regulatory statement, or to consult on the proposed Code amendment and the regulatory statement, before amending the Code if:

- the Authority considers that it is necessary or desirable in the public interest that the proposed Code amendment be made urgently; and

- along with the notice of the amendment that is published in the Gazette to make the amendment, the Authority publishes a statement of the reasons why the urgent amendment is needed.

2.12. An amendment made under section 40 of the Act expires on the date that is 9 months after the date on which it comes into force.

2.13. To avoid the need to repeat the urgent Code amendment, the Authority will exercise reasonable endeavours to consult on any further Code amendment required to replace the amendment made under urgency.

Confidential information

2.14. During consultation interested parties may wish to provide the Authority with confidential information and request that the Authority does not publish the information, due to commercial sensitivity or other valid reasons.

2.15. Whilst the Authority may agree to keep such information confidential (subject to the Authority's overriding obligations under the Official Information Act and other legislation), the reliance that the Authority will place on that information may be diminished, particularly when the Authority is not in a position to verify or test the information or where other affected parties are not in a position to challenge or otherwise comment on the information.

2.16. If the Authority decides to rely on any such confidential information, the Authority will request the party providing the information to provide a non-confidential summary of the information. To the extent practicable, the Authority will publish the non-confidential summary of the information and a statement as to whether the confidential information affected its decision.

3. Other consultations by the Authority

3.1. In addition to matters related to the Code, the Authority will consult with interested parties on:

- the Authority's proposed appropriations,[6] which includes information on the Authority's work priorities;[7] and
- a draft of the Authority's charter about advisory groups.

3.2. For these particular consultations, the Authority will adopt the general consultation principles set out in paragraph 2.1.

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[6] Before the Authority submits a request to the Minister of Energy and Resources seeking an appropriation of public money for the following year, the Authority must consult about that request with those industry participants who are liable to pay a levy and any other representatives of persons whom the Authority believes to be significantly affected by a levy (section 129 of the Act).

[7] The Authority uses this information on work priorities to prepare its Statement of Intent (SOI). Although there is no public consultation process associated with drafting the SOI, the Crown Entities Act 2004 requires the Authority to consult with the Minister of Energy and Resources on the draft SOI.

4. Feedback sought when the Authority is not required to consult under the Act

4.1. There are also other matters on which the Authority may seek feedback from interested parties, but for which the Authority is not required to consult under the Act. Examples include discussion papers on issues and options for Code amendments and market-facilitation measures.[8]

4.2. In such instances, the Authority may adopt the general principles and processes described within this Charter having regard to the materiality of the matter being considered, the particular feedback sought and related factors. The Authority does not consider it appropriate to have a "one size fits all" approach to seeking feedback from interested parties.

4.3. Where, on written request by the Minister,[9] the Authority must review and report on any matter relating to the electricity industry that is specified by the Minister, the Authority may seek feedback from interested parties, having regard to matters including those set out in clause 4.2, the timing for the report specified by the Minister, any direction from the Minister about consultation, and any confidentiality issues surrounding the report.[10]

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[8] Market-facilitation measures are defined under the Act to include the provision of education, guidelines, information, and model arrangements.

[9] For the time being the Minister of Energy and Resources.

[10] Noting that the Minister may, in making publicly available a final report on a review conducted by the Authority under section 18 of the Act, omit any information that he or she would be likely to withhold if it were requested under the Official Information Act 1982.